

U.S. Department of Commerce Seeking Comments on Particular Market Situation

November 29, 2022

Key Points

- The DOC is seeking public comments on its PMS methodology in AD proceedings, which authorizes DOC to deviate from its normal calculation methods upon a finding of PMS that distorts the market in the exporting country.
- Under its PMS authority, DOC has in several cases adjusted the cost of production in the exporting country upward to account for the market distortion, which tends to inflate dumping margins.
- DOC's PMS approach has given rise to a series of lawsuits, including a recent CAFC opinion, that prompted the agency to reconsider its methodology.
- Parties now have an opportunity to reshape DOC's PMS methodology and how it might affect the outcome of future AD proceedings. Comments are due no later than **December 18, 2022**.

On November 18, 2022, the U.S. Department of Commerce (DOC) issued an [advanced notice of proposed rulemaking](#), seeking public comments as it considers amending its "particular market situation" (PMS) methodology. DOC's approach to the PMS issue has significantly altered the course of several antidumping duty (AD) proceedings in recent years, leading to a series of lawsuits. Through the proposed rulemaking, parties now have an opportunity to reshape DOC's PMS methodology in future proceedings.

In an AD proceeding, DOC generally calculates dumping margins by comparing the price at which the subject merchandise is sold in the United States to the "normal value," which is the price of like products in the exporting country or a third country. In the absence of a viable comparison market (i.e., the exporting country or a third country) to calculate the "normal value," DOC resorts to the "constructed value" based on the costs of producing and selling the merchandise, with an allowance for profit.

The finding of a PMS, however, empowers DOC to deviate from the normal antidumping calculations described above. The Trade Preferences Extension Act of 2015 (TPEA) expanded DOC's PMS authority, allowing DOC to use "any other calculation methodology" if "the costs of materials and fabrication or other processing

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of any kind does not accurately reflect the cost of production in the ordinary course of trade.” Examples of a possible PMS include the availability of energy or other inputs at low prices due to some distortion in the market, which reduces the cost of production in the exporting country. Since the enactment of the TPEA, DOC has used PMS methodologies in AD proceedings involving countries such as South Korea, Argentina and Turkey. PMS methodologies tend to inflate dumping margins because DOC often adjusts the costs of production upward to account for the market distortion, and then compares the adjusted “constructed value” to the U.S. sales prices.

DOC’s decision to revisit its PMS methodology arises, in part, from a recent decision in *Nesteel v. United States*, 28 F.4th 1226 (Fed. Cir 2022). In that case, the Court of Appeals for the Federal Circuit (CAFC) criticized DOC’s PMS finding for lack of substantial evidence. The CAFC also reached four conclusions:

1. A PMS that distorts costs must cause costs to deviate from what they would have otherwise been in the ordinary course of trade.
2. A PMS must be particular to certain producers or exporters, inputs or the market where the inputs are manufactured.
3. If there is a claim of a subsidy or government interference, there should be evidence that the producer or seller of the input at issue received, or should have received, that subsidy or government assistance, and that there is some impact on the price of the input as a result of that subsidy or government interference.
4. DOC is not required to quantify a distortion in costs by the PMS to find the existence of a PMS, but if DOC is able to quantify the distortion, such a quantification may help support a finding of the existence of a PMS.

In light of the *Nesteel* decision, DOC believes that it may be beneficial to standardize the information requirements to enhance its consistent administration of the PMS provision. DOC is seeking comments on three issues:

1. Identify information that commenters believe DOC should consider in determining if a PMS exists that distorts the costs of production if that information is reasonably available and relevant to the PMS allegation.
2. Identify information that commenters believe DOC should not be required to consider when determining if a PMS exists, regardless of the PMS allegation.
3. Provide comments on adjustments that DOC may make to its calculations when it determines the existence of a PMS, but the record before it does not allow for the quantification of cost distortions.

Comments are due no later than **December 18, 2022**.

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